IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1363

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

J. WEINGARTEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO,
Petitioner,

vs.

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

MILTON SMITH,
General Counsel,
RICHARD BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N. W.,
Washington, D. C. 20006,

JERRY KRONENBERG,
Borovsky, Ehrlich & Kronenberg,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for the Amicus Curiae.

Of Counsel:
COLE, ZYLSTRA & RAYWID,
2011 Eye Street, N. W.,
Washington, D. C. 20006.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the Rules of this Court for leave to file the attached brief *amicus curiae* in support of the Employer, Quality Manufacturing Company.

This motion is directed only to the *Quality* case. With respect to the case to be heard in tandem with *Quality, National Labor Relations Board* v. *J. Weingarten, Inc.*, both the Solicitor (the Petitioner) and the Employer have consented to the Chamber's participation therein. In the *Quality* case, the Chamber has received the Employer's consent to participate.

Inasmuch as *Weingarten* and *Quality* present a common question, the accompanying brief is directed not only to the *Weingarten* case, pursuant to the received consents, but also is filed in the *Quality* case, contingent upon this Court's granting the Chamber's motion to participate in that proceeding.

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' view on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court and Courts of Appeals.*

The instant proceeding, just as the companion *Weingarten* case, is of particular concern to the Chamber's members, as well as to employers generally, since it involves a question of theoretical significance in the administration of the National Labor Relations Act which also has enormous practical importance in employers' ability to manage their businesses efficiently. The rule of law which the Board has applied in this case reflects a view of the content and limits of Section 7 of the Labor Act which is both unprecedented and which constitutes an impingement upon what has been considered a legitimate exercise of management prerogatives. Thus, in de-

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* *E.g., N.L.R.B.* v. *Textron, Inc.*, ... U.S. ...., 85 LRRM 2945 (1974); *Geduldig* v. *Aiello, et al.*, ... U.S. ...., 8 F.E.P. Cases 97 (1974); *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213, 34 L. Ed. 2d 422 (1972); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *H. K. Porter Co.* v. *N.L.R.B.* 397 U.S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al.*, ... U.S. ...., 85 LRRM 2913 (April, 1974); *N.L.R.B.* v. *Mobil Oil Corp.*, 482 F. 2d 842 (1973); *N.L.R.B.* v. *Frank Visceglia and Vincent Visceglia t/a Peddie Buildings*, ... F. 2d ...., 86 LRRM 2541 (CA 3, 1974); *Scott Hudgens* v. *N.L.R.B.*, No. 73-3264 (CA 5, 1973).

termining the extent to which employees may insist upon union representation during private interviews with management, this Court will determine not only the validity of a rule, but the validity of the Board's approach to the interpretation of Section 7. Similarly, the resolution of this question will govern, in an important respect, management's ability to secure the information from its employees which it requires effectively to manage its business. Unlike some other questions of comparable theoretical interest, the issue posed here is one which confronts all employers, regardless of their size or the nature of their businesses, and arises with frequency in the regular course of their managerial responsibilities.

Accordingly, the practical significance of the issue presented here, together with the implications of the Board's interpretation of the statute and the resulting problems which are created in the administration of the Act, impels the Chamber to submit its views for the consideration of this Court.

Inasmuch as the Chamber is filing in support of the Respondent, *Quality*, it does not appear that the Petitioner has been prejudiced by the Chamber's submission of its brief at this time. Indeed, as stated, the Solicitor, the Petitioner in the companion *Weingarten* case, similarly circumstanced with the Petitioner in *Quality*, has expressly given such consent.

WHEREFORE, the Chamber respectfully urges the Court to grant this Motion for leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

MILTON SMITH,
General Counsel,
RICHARD BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N. W.,
Washington, D. C. 20006,

JERRY KRONENBERG,
Borovsky, Ehrlich & Kronenberg,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for the Amicus Curiae.

Of Counsel:
COLE, ZYLSTRA & RAYWID,
2011 Eye Street, N. W.,
Washington, D. C. 20006.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

INTEREST OF THE AMICUS CURIAE.

The interest of the Chamber is set out in the foregoing Motion for leave to file this *amicus curiae* brief.

SUMMARY OF THE ARGUMENT.

These cases present the common issue of whether the National Labor Relations Act requires an employer to permit an employee to have union representation at a fact finding investigatory interview if the employee has reasonable grounds to believe that disciplinary action might result from the employer's investigation. The courts below,[1] reversing holdings by the Labor Board, answered the presented question in the negative. The Chamber contends that the decisions of the courts below should be affirmed by this Court inasmuch as the rule promulgated by the Board's decisions below is illogical, unworkable, and inconsistent with congressional intent and the design and objectives of the Labor Act.

This Court's rationale in *N.L.R.B.* v. *Textron, Inc.*, ... U.S. ....., 85 LRRM 2945 (1974) endorses the Chamber's position. There, this Court held that the Labor Board cannot summarily overturn years of uniform statutory construction, and contrary to congressional intent, read a more restrictive meaning into the Act. Contrary to *Textron's* reasoning, the Board in its *Quality* decision below enunciated a rule governing employees' entitlement to union representation during interviews

1. *N.L.R.B.* v. *Quality Manufacturing Company*, 481 F. 2d 1018 (CA 4, 1973), denying enforcement of 195 NLRB 197; *N.L.R.B.* v. *J. Weingarten, Inc.*, 485 F. 2d 1135 (CA 5, 1973), denying enforcement of 202 NLRB No. 69.

with management which reversed established precedent, contravened congressional intent and the scheme of the Act and imposed new restrictions upon employers. Thus, until its decision in *Quality* below, the Board with court approval had consistently held that the statutory rights of employees did not include the right of union representation in pre-disciplinary investigatory interviews with management. In addition to overturning years of uniform statutory construction, the Board's new rule imposes new and rigorous restrictions upon employers as they attempt to elicit information necessary to maintain efficient operations. The presence of union representatives in fact-finding interviews will frustrate and may well foreclose the flow of information that is required by employers if they are to make reasonable decisions with respect, *inter alia*, to plant security, employee discipline, and work flow.

It is apparent that the Board's long-standing rule concerning the right to representation during investigatory interviews, rather than the rule it enunciated in *Quality* and followed in *Weingarten*, is consonant with the statute's design and with congressional purpose. The former rule had existed since at least 1947. Had Congress believed that the Board's construction of the Act constituted a misconception of congressional intent, it could have effected a correction either in the subsequent Taft-Hartley Amendments or in the Amendments of 1959. Furthermore, the new rule has manifold internal infirmities, which make it unworkable and consequently an unreliable guide to conduct as employers embark upon their many and varied interviews with their employees. It should not be presumed that a rule whose application is fraught with uncertainty is a manifestation of Congress's intent absent legislative expression endorsing such a result. Such a pronouncement is, of course, not here present.

It follows from the foregoing that the Board's new rule must be rejected pursuant to this Court's reasoning in the analogous *Textron* case. The Board below has attempted to accomplish what this Court has proscribed in *Textron:* it has promulgated

a rule which overturned a history of uniform statutory construction, infused new restrictions upon employers as they engage in daily, normal business operations and acted in a manner not contemplated by Congress and contrary to the design of the Act.

Independently, the novel construction of the Act forged by the Board below must be repudiated since it does not involve concerted activity which is recognized and protected by the Act. That is, an employee's request for representation at an investigatory interview involves merely an attempt to secure his personal interest and therefore does not constitute concerted and protected action. Thus, it has been judicially recognized that in order to prove activity is concerted under Section 7, it is necessary to demonstrate that the activity was for the purpose of preparing for group action to correct a grievance or a complaint. During a pre-disciplinary fact finding interview, no management decision affecting an employee's working conditions has transpired, and therefore there has been no determination that could serve as the basis for a grievance. It follows that a request for representation during an investigatory interview is not made to prepare for group action to correct a grievance or complaint. Consequently, such a request is not activity that is recognized to be concerted and protected by the Act.

Furthermore, since under established Board precedents a union has no right to demand that it be present at such interviews, the nature of the interests to be protected at the interview cannot be considered to be collective or concerted. Otherwise, since a union is charged to protect collective interests, an employer would be statutorily compelled to permit its presence.

It is evident from the foregoing that the objectives of the Act will not be served by recognizing the validity of the Board's new rule, and, accordingly, this Court is urged to repudiate it and affirm the decisions of the courts below.

ARGUMENT.

THE BOARD'S RECENTLY ADOPTED RULE ENTITLING EMPLOYEES TO UNION REPRESENTATION DURING INVESTIGATORY INTERVIEWS WITH MANAGEMENT PERSONNEL IS CONTRARY TO THE DESIGN AND OBJECTIVES OF THE ACT.

A. The Board's New Rule Reverses Twenty-five Years of Uniform Precedent and Contravenes Both Congressional Intent and the Rationale of This Court's Textron Decision.

This Court in its *Textron*[2] decision has held explicitly, and the Chamber is contending, that the National Labor Relations Board cannot summarily reverse years of uniform statutory construction and, contrary to Congressional intent, read a new and more restrictive meaning into the Act.

It follows from the rationale underpinning *Textron* that the Board has no warrant to hold, as it did below, that an employer must permit an employee to have union representation during a fact finding, predisciplinary interview whenever the employee thinks he has reasonable ground to fear that disciplinary action may result from the employer's investigation. The holdings by the Board below, analogous to the Board's *Textron* decision, represent a dramatic reversal of years of consistent statutory construction, severely restrict an employer's ability to secure information necessary to conduct his business and contravene Congressional intent.[3]

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2. *N.L.R.B.* v. *Textron, Inc., supra.*

3. As the court below in *Quality* aptly and correctly observed, "never has it been thought, as the Board would hold here [in Quality], that [an employee's statutory rights] require an employer to permit an employee to have a union representative present whenever the employee 'has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions'." 481 F. 2d 1018, at 1024.

From at least the time the Seventh Circuit decided *N. L. R. B.* v. *Ross Gear and Tool Co.*,[4] in January, 1947, until the Board's decision in *Quality* below in January, 1972, the Board had adhered to the proposition that employees were not statutorily entitled to the presence of their union representatives at management interviews held to gather information or investigate facts; employers were held neither to violate Section 8(a)(1) nor 8(a)(5) by refusing to permit the union to be present until after some decision was made which could become subject to the parties' grievance and arbitration machinery.

Thus, in an administrative decision of the General Counsel's office in 1962,[5] the General Counsel refused to issue a Complaint in a situation where an employer prevented a union steward from attending an interview whose purpose was to verify an employee's excuse for his absence from work. According to the General Counsel, the statute created no duty on the employer to permit union attendance at employee interviews until the employer's investigation was completed. While this decision did not come before the Board since no violation of law was found warranting further proceedings, the Board did have an opportunity to confront the issue shortly thereafter in *Chevron Oil Co.*[6] For purposes of the instant proceedings, *Chevron Oil* was a particularly instructive case since the General Counsel had apparently altered his view of the law as expressed in the 1962 administrative decision, and urged upon the Board the contention that an employer violates Section 8(a)(1) of the Act by depriving an employee of union representation at a management interview when there exists a *possibility* of discipline resulting therefrom. The Board rejected the General Counsel's arguments and restated its conviction that the Act conferred no such asserted right during the performance of management's investigatory role. Not only did the Board precisely reject the

4. 158 F. 2d 607 (CA 7, 1947).
5. SR-2382, CCH NLRB Paragraph 11,991 (1962).
6. 168 NLRB 574 (1967).

position there which it now asserts in the cases below, but it did so specifically in the context of an 8(a)(1) charge.

In the instant proceedings the Board, in its brief in *Weingarten* pages 24-26, seeks to distinguish its former contrary decisions, such as *Chevron Oil*, by urging that it merely affirmed decisions of law judges without any "considered analysis" and by asserting that the prior decisions involved the question of unions' rights to be present at employee interviews pursuant to the bargaining rights conferred in Section 8(a)(5), rather than, as here, employees' right to representation as conferred in Section 7 and violated in Section 8(a)(1). The Board's attempt to justify its new rule by "confessing" that for over 25 years it merely rubber-stamped law judges' decisions without analysis is startling on its face. The Board is charged with deciding unfair labor practice controversies arising under the Act. (Section 10(c)). Accordingly, it is presumed that the Board obeys its congressional mandate. Therefore, a summary affirmance of a law judge's decision must necessarily constitute complete agreement with that decision and *its rationale*. If the Board at its whim may deny the precedential value of any decision where it has affirmed a judge's findings without significant comment, a wholesale reevaluation of what may constitute Board precedent will be necessary. This will result in chaos for those involved in the labor-management field and produce a justifiable erosion of public confidence in administrative tribunals. The Board's explanation therefore must fall because it is foreign to our administrative system and to sound labor policy.

In the *Weingarten* case then, the Board's effort to mask the inconsistency of its current position is unavailing. Indeed, the majority of the present Board ignored the teaching of its predecessor which, in *Chevron Oil*, adopted the following conclusion and rationale of the Law Judge:

> "To be sure, *Section 7* of the Act guarantees to employees the right to be represented by their collective bar-

> gaining representative in all areas pertaining to their terms and conditions of employment, and the penalty of suspension from work for alleged insubordination most assuredly is encompassed within those terms and conditions. . . . But this is not to say that a bargaining agent must be privy to management councils, or that represented employees must be shielded by that agent from company inquiries, on each and every occasion when management embarks upon an investigation to ascertain whether plant discipline has been breached. . . . I fail to perceive how the exclusion of Union Steward Kosmyna from those meetings intruded upon the *rights of employees* or affected the Union's representative status . . . [or how] Respondent evaded *any* statutory obligation by refusing to entertain the presence of a union representative during the discussion of an alleged rule infraction when no definite adverse action has as yet been decided upon by Respondent."[7] (Emphasis added).

In an unbroken line of cases, the Board has adhered to the holding and rationale of *Chevron Oil*. The resulting rule was adopted and followed in *Jacobe Pearson Ford, Inc.*,[8] *Dayton Typographic Service*,[9] *Wald Manufacturing Company*,[10] *Texaco, Inc. Los Angeles Sales Terminal*,[11] *Illinois Bell Telephone*,[12] and *LaFayette Radio Electronics*.[13] In all of these cases the Board rejected claims that *employees* had a statutory entitlement to the presence of union representation during investigatory interviews with management.

In an instance in which the Board held the presence of such representation to be proper, the predicate for that result was the Board's conclusion that the purpose of the interview was not investigatory, but was rather to develop evidence, *following*

7. 168 NLRB at 578.
8. 172 NLRB No. 84 (1968).
9. 176 NLRB 357 (1969).
10. 176 NLRB 839 (1969), aff'd 426 F. 2d 1328 (CA 6 1970).
11. 179 NLRB 976 (1969).
12. 192 NLRB No. 138, 78 LRRM 1109 (1971).
13. 194 NLRB No. 77, 78 LRRM 1693 (1971).

a decision to impose discipline, to support the previously reached determination.[14]

Each of the cases decided after *Chevron Oil* cited that case as governing authority. Each of them, therefore, may be considered to have adopted *Chevron's* determination that *neither* Section 7 nor Section 8(a)(5) constituted statutory warrant for the union's presence during pre-discipline interviews; nothing stated by the Board in any of them suggested any disposition to reach any other conclusion with respect to either the Section 7 or Section 8(a)(5) aspects of the *Chevron* decision.

A particularly instructive case is *LaFayette Radio Electronics, supra.* This case was decided only six weeks before the Board determined, in *Quality,* to overturn the accepted and long-established rule which was created by the decisions in the series of cases discussed above. In *LaFayette,* the Board adopted the Law Judge's summary of the law as it had been forged during at least the previous twenty-five years:

> ". . . the principle appears to have evolved that the right to union representation exists if the purpose of the meeting between the employee and management is disciplinary; but that the union has no right to be present if the purpose of the meeting is fact finding or investigatory."[15]

It should be noted that the principle thus articulated is framed in terms of the *employee's* "right to union representation" and hence involves an interpretation of the content of Section 7 of the Act; it does not represent, as the Board's attempted distinction between its new and former rule would have it, a focus only

14. *Texaco, Inc., Houston Producing Div.,* 168 NLRB 361 (1967), enf. den. 408 F. 2d 142 (CA 5, 1969), on the ground that employees' right to union representation does not extend to all dealings with the employer which may ultimately affect employment conditions.

15. 194 NLRB 491, 492. It is evident that the Judge considered the principle involved to be based upon Board precedent even though the Board may simply may affirmed previous Law Judges' decisions.

on the *union's* role as bargaining agent under Section 8(a)(5). Similarly of significance in *LaFayette* is the fact that the General Counsel had sought from the Board a ruling granting employees the right to union representation at all interviews with management, whether investigatory or not, from which a decision to effect any discipline might emerge. This effort, which appeared to seek a rule analogous to that of this Court's right-to-counsel rule in *Escobedo* v. *State of Illinois*,[16] was firmly rejected by the Board in favor of the above-quoted then existing and established legal standard.

The foregoing discussion of the evolution of the Board's rules gives rise to two conclusions. First, the Board's former rule concerning employees' right to union representation during investigatory interviews stems at least from the time the Seventh Circuit decided *Ross-Gear & Tool Co.* in early 1947. That decision predated the Taft-Hartley amendments to the Labor Act. Had Congress believed that rule to constitute a misconception of its statutory design, it could have effected a correction either in the subsequent Taft-Hartley amendments or in the amendments of 1959 or at any other time. On the contrary, despite so long a history of uniform application of that rule there is no evidence of Congressional displeasure with it. It would appear fair to conclude, therefore, that the rule fairly expressed Congress' intent.[17]

Second, where an administrative rule of law has become accepted and established over a long period of time, without objection from the legislature body whose enactment gave rise to it, the courts should be reluctant to accept a reversal of that rule in the absence of a change in the statute. The justification of such a reversal should constitute a heavy burden for the administrative body which seeks to impose it. In the instant cases, the Board has offered no explanation for its action. As the court below in *Quality* observed, the Board has failed to articulate reasons for reversing years of uniform statutory interpretation.

16. 378 U. S. 478.

17. In addition, part B advances arguments that demonstrate that the *new* rule is contrary to congressional intent.

If the Board is to enlist judicial approval of its new interpretation of the Act, it must demonstrate by compeling argument that its novel construction is an accurate reflection of Congressional design. The Board's failure to advance such arguments requires the rejection of its new interpretation of the Act.

Furthermore, as demonstrated above, the Board's effort to distinguish between Section 7 and Section 8(a)(5) rights in order to avoid the appearance of conflict is not supported by its own prior decisions. Nor is it rational to accept such a distinction-after-the-fact. If all those employees who were held unentitled to union representation over the past years could have achieved a different legal result merely by arguing their cases differently or relying on a different Section of the same statute, then surely that point would have been made by the Board in some manner in at least one of its prior decisions. That no such observation was made is ample proof that in the instant case the Board is indeed advancing a new and inconsistent interpretation of the statute.

It cannot be doubted that this novel interpretation of the Act will significantly restrict employers in their efforts to ascertain facts necessary to make required management decisions with respect, *inter alia*, to plant security and work rules. As will be discussed in more detail in part D *infra*, the presence of union officials at fact finding interviews will frustrate, if not entirely foreclose, the flow of information that management needs to efficiently operate its business. Thus, similar to its attempt in *Textron*, the Board below has imposed new restrictions upon employers, contrary to congressional intent. In *Textron* the Board had determined that all managerial employees are covered by the Labor Act, except those whose participation in a union would create a conflict of interest with their job responsibilities. This Court, rejecting the Board's holding, reasoned that it conflicted with long-standing Board precedent which had excluded all managerial employees from the Act's coverage. This Court further recognized that the Board's decision diminished management's necessary control over those persons who formulated his policy and clearly contravened

congressional intent. Thus, the effect of the Board's rule below is similar to the result that the Board sought to accomplish in *Textron*. Both below and in *Textron* the Board overturned long-standing precedent, infused new restrictions upon employers as they operated their businesses and contravened congressional intent and the Act's design.

In view of the rationale underlying *Textron* and the arguments urged above and hereinafter, the Board's novel construction of the Act must be rejected.

B. The New Rule Is Illogical and Unworkable.

A fundamental premise of sound legislative construction is that Congress should not be presumed to have intended, or subsequently to approve, a statutory interpretation which is logically and philosophically unsound.[18] The subject rule, as an interpretation by the Board of the latitude of Sections 7 and 8(a)(1) of the Act, is the product of such an interpretation.

This rule,—which provides that an employee who is called in for *any* interview or discussion by management and who requests union representation may not lawfully be denied such representation so long as the employee has reasonable grounds to fear the interview *may* adversely affect his working conditions,—contains serious infirmities.

Initially, a finding that the employer, by denying such a request, has violated the law is a function of what the employee says and what the employee may suspect. Thus, curiously, the employer's violation of law may have nothing whatever to do with what *he* does or believes or intends, with whether his object is anti-union or wholly altruistic. Since what an employee believes to be the employer's intention or desire may bear no relationship to fact,—as, for example, when the employee hears plant rumors which are both untrue and unknown to the employer, a violation of this rule by an employer may

18. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381.

result from an incorrect belief by the employee in the presence of non-existent intentions all unknown to and unknowable by the violating employer.[19]

Just as this rule focuses on the conduct and attitudes of the wrong persons, it also emphasizes the importance of the wrong variables. For the portion of the rule which makes reference to an employee's "reasonable grounds" to fear an adverse consequence of an interview with management presents its own serious problems. What is objectively "reasonable" has no necessary relationship to reality. The need to determine in every instance of the application of this rule whether a given employee reacted with objective reasonableness to the totality of circumstances surrounding his situation will inevitably involve inquiry into the private and hence subjective views of each employee. What is "reasonable" to any given individual depends not only on his knowledge and assessment of external circumstances, but also on his knowledge of his personal situation and the relationship of the one to the other. Thus, for example, whether an employee has a reasonable basis to fear discipline as a result of interviews concerning damage to company property must depend both upon the employee's awarness of the existence of damage and of his own responsibility or participation. Neither the employer nor the Board can really be sure of the employee's basis for reasonable fear in the absence of his confession of guilt. On what basis, therefore, is the employer to judge whether he must, under the rule, permit union representation? If the mere fact that an interview is to be conducted on a matter warranting discipline is sufficient to cause reasonable fear on the part of anyone interviewed, then the rule's focus

19. Of course, the employer may obviate his own difficulties with this rule by ceasing to hold any employee interviews at all or by permitting the union to be present at all times, thus forsaking either the benefits to be derived from such meetings or an important aspect of management's right effectively and, where necessary, confidentially to run its own administrative affairs in a non-discriminatory manner. A purpose to compel such a choice should not easily be attributed to Congress.

on the concept of reasonable fear is a superfluity; the rule, in that case, should merely require union representation at all interviews. The Board does not go that far, of course, and thus creates an impossible dilemma: the mere fact of the interview alone does not give rise to an objective and reasonable fear of adverse consequences, and the extent to which the employee has a genuine basis for fear, through discovery of his own culpability, cannot be known by the employer prior to the interview. However, it is frequently at that time that he must make his decision whether to allow union representation. Thus, at least as a general proposition, the rule cannot be rationally applied on its own terms.

Indeed, the difficulty in applying it under any circumstances can be demonstrated from an example cited by the Board itself, in its *Quality* decision below, as an illustration of a clear case when an employee would have no basis for seeking union representation. The Board majority suggests that an interview for the purpose of giving an employee "needed corrections of work techniques" would not tend to produce a reasonable fear of adverse consequences and the Board would not, therefore, require an employer to permit union representation. However, there are several problems inherent in this illustration. First, the Board's rule does not appear to require the employer to disclose the precise purpose of the interview in advance, so that an employee called to an interview may have no basis for knowing how "fearful" he should be of its consequences. May he compel the employer to state the exact purpose of a requested interview before he agrees to attend? Should he with impunity be allowed to refuse to attend without such disclosure by his employer? If an employee has committed a serious infraction of the plant's work rules and is called by management to an interview whose purpose is not stated to him but, in fact, involves another matter offering no jeopardy whatever, what are his rights? On any objective standard, the employee has reason to fear the consequences of the interview whereas the employer,

having read the Board's *Quality* decision, knows that the Board believes there to be "no reasonable basis for [the employee] to seek the assistance of his representative" in the interview which the employer wishes to conduct. And, finally, it is submitted that reasonable men can differ even with respect to the substance of the illustration the Board majority cites as being clear. For it appears to the *amicus curiae* that even were an employee to be informed prior to a requested interview that its purpose was to correct his work techniques, he might well have justifiable fear that the poor work performance which gave rise to the need for the interview might also result in a transfer to another job or another shift or to a probationary status pending improvement in his performance. A poor worker interviewed about his poor work techniques may thus have a more substantial basis for a reasonable fear of adverse consequences than another employee who is interviewed about a theft he did not commit, yet the Board would presumably require the requested presence of union representation only in the latter situation.

The Board's decision in *Mobil Oil Corp.*, 196 NLRB No. 144 (1972), enforcement denied 482 F. 2d 842 (CA 7, 1973), raising the same issue as is presented here, illuminates the weaknesses in its new rule. In that case employees Burnett, Smith, Mathews and Hill were interviewed by the same management personnel, for the same purpose, in the same manner and received the same discipline for the same offense. Yet the discharges of the first two were deemed unlawful because they sought representation prior to or during their interviews, while the discharges of the remaining two were considered proper because they made no such request. However, the only employee of the four who was willing to sign a statement was Smith who asserted his innocence throughout. He, presumably, had no basis for fear or appeared to have none insofar as such conduct evidences his state of mind. Yet his discharge was unlawful. Employee Mathews, who refused to sign any such state-

ment but failed to seek the union's presence was considered permissibly discharged, although his conduct would appear to suggest a more substantial basis for fear of discipline by management. The implication of the Board's decision in that case is that establishment of the existence of the required reasonable fear of adverse consequences may reduce simply to whether the employee seeks the union's presence and assistance. The disposition of Smith's case suggests that conclusion. This may well be the only rational way to apply the rule, but it is nonetheless a distortion of the terms of the rule itself. A rule of law whose sensible enforcement involves ignoring some of its own requirements should not be construed to comport with Congress' intent or design.

C. An Employee's Request for Representation at Investigatory Interviews Involves a Personal Interest and Not Protected, Concerted Action.

The National Labor Relations Act protects employees' *concerted* activity. An employee acting for himself and who pursues interests which are personal and not shared by his fellow members of the bargaining unit does not, therefore, engage in conduct which the Act was designed to protect. It is submitted that a request for union representation at an investigatory interview seeks personal protection unallied to a protected group or collective interest.

The body of law traced in the preceding sections of this brief established, at a minimum, that a union as a functioning entity has no right to demand to be present at investigatory interviews of its members; that is, an employer would not violate Section 8(a)(5) of the Act by rejecting the union's demand.[20] Since unions are charged with the duty of representing their members

20. The Board has not quarrelled with this conclusion. Rather, the Board adopts it, arguing that the representational claim involved here stems from employees' rights under Section 7 and not from unions' rights under Section 8(a)(5).

in matters in their collective interest, it appears to follow that in the described line of cases the Board has already determined that union representation at investigatory interviews is not required by any such collective interest; otherwise employers surely would be compelled to permit the union's presence.

In order to justify its findings below, the Board asks this Court to adopt a conceptually untenable position: an employee would be held to have a right to union representation under the language of Section 7, which guarantees him the right to engage in "*concerted* activities for the purposes of *collective* bargaining or other mutual aid or protection", while the union's statutory inability to insist on being present negates the existence of a collective bargaining purpose or concerted activity or any employee effort to secure mutual aid. The Board cannot have it both ways. If the interests or potential jeopardy of an employee at an investigatory interview do not rise to the level which would permit his union representatives to involve themselves in his protection, then, as a matter of logic and statutory design, the employee himself cannot compel the union's representation to protect the very same interests. The extent of the interests to be protected, the need for protection and the nature of the services which the union can provide its members is the same whether the performance of those services is sought to be invoked by the union itself or by an employee whom it represents.

It follows, therefore, that the described representation sought by an employee must constitute an effort to secure an individual or personal employment right which unions do not protect, rather than a concerted one which they do protect. Whatever may be the merit or wisdom in an eventual statutory recognition of such rights in employment situations, it is clear that the Act currently neither recognizes nor protects such alleged rights. Unless Congress moves to confer them by amendment, the Act may not be interpreted to cover them.

Accordingly, during investigatory interviews with management,—a period prior to the engagement of the union's au-

thority to act on behalf of a member's interests,—requests for representation involve unconcerted individual conduct, unprotected by the Act. *Mobil Oil Corporation* v. *N.L.R.B.*, 482 F. 2d 842 (CA 7, 1973); *N.L.R.B.* v. *J. Weingarten, Inc., supra.*

Furthermore, as the Seventh Circuit held, in order to prove concerted activity under Section 7, "it is necessary to demonstrate [at least] that the activity was for the purpose of inducing or preparing for group action to correct a grievance or a complaint. *Indiana Gear Works* v. *N.L.R.B.*, 371 F. 2d 273, 276 (1967). This decision is consonant with the earlier decision in that circuit, *N.L.R.B.* v. *Ross Gear & Tool Co.*, 158 F. 2d 607 (1947). *Ross* held that there is no statutory right to representation at interviews not involving the presentation of a grievance. The Board's decisions in these causes below are clearly inconsistent with *Indiana Gear* and with *Ross*. That is, during a fact finding interview no management decision affecting an employee's working conditions has been made, and therefore there has been no decision that could serve as the basis of a grievance. It follows that a request for representation during an investigatory interview cannot have been made to prepare for group action to *correct* a grievance; the request is accordingly not "concerted activity" as that term has been traditionally used when speaking of employee rights under the Act.[21]

21. The Petitioner's reliance on *N.L.R.B.* v. *Washington Aluminium* (370 U.S. 9 (1962)) is wholly misplaced. There, the activity—walking off the job—was traditional concerted activity *initially* and, therefore, entitled to the Act's protection. Here, in contrast, the request for representation during investigatory interviews does not involve concerted conduct, and accordingly, cannot be protected by the Act.

Thus, as demonstrated in detail above, an employee's request for representation during an investigatory interview is not designed to prepare for group action to correct a grievance, since no management decision to discipline the employee has been made. Furthermore, since under Board law a union has no right to demand that it be present at a fact finding interview, the nature of the interests to be protected and the need for protection at such an interview is not collective or concerted. Otherwise, since a union is charged with protecting these interests, an employer would be compelled

D. The Board's Newly Adopted Rule Converts a Non-Mandatory Subject of Bargaining Into an Unfair Labor Practice and, Independently, Is Contrary to Sound Policy and the Purposes of the Act.

A principal policy objective of the National Labor Relations Act is to effect a balance between employees' right to act in concert for their mutual protection and employers' right to operate and manage their businesses effectively and without interference.[22] The challenged rule of law which the Board has applied to these cases creates an unnecessary and harmful imbalance between these competing rights because it interferes with employers' ability to secure needed information while according to employees rights which are not required for the furtherance and protection of their legitimate interests.

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by the Act to permit its presence. For these reasons, the request for representation necessarily involves only non-concerted, unprotected conduct and *Washington Aluminium* is therefore inapposite.

Washington Aluminium is not applicable for another and independent reason. In that case there were at issue two separate and distinct duties to the involved employees: a duty to bargain with those employees; a duty not to discipline them. Each of these duties existed independently from the other and each was enforced by a specific section of the Act. Consequently, an employer might breach one of these independent duties but not the other, as in fact occurred in *Washington Aluminium*, and thus violate one statutory provision but not the other.

Here, in contrast, there is at issue only a single duty: whether an employer has a duty to employees to permit them to have union representation during investigatory interviews with management. Whatever the ultimate resolution of the issue in this case, *Washington Aluminium* is not authority for the Petitioner's contentions.

22. *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970); *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539 (1972). See also *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971), in which this Court stated that managerial judgments which threaten employees' jobs are not necessarily subject to bargaining: "Other considerations, *such as the effect on the employer's freedom to do business*, may be equally important." 30 L. Ed. 2d at 358, n. 19. (Emphasis added.)

The effective, efficient management of a business will frequently require a company to engage in investigatory interviews. Management's opportunity to make reasonable and appropriate decisions with respect to numerous areas of its legitimate concern, whether plant security, formulation and adherence to rules and employee discipline, or problems of work flow, are subject to its right to secure reliable information from employees. Were the availability of that information to be curtailed, a company's ability intelligently to make such decisions would severely be inhibited. Yet the presence of union agents at every investigatory interview from which any employee, however mistakenly, feared some adverse consequence would inevitably result in such a curtailment of information. For the union agent's representation of an employee would likely take the form of a prohibition on giving any information at all; this would be the clearest means for assuring that nothing would be said or revealed of possible harm. Whether the union representative would recommend a total or only partial refusal to cooperate is immaterial. The effect of either course would tend to deprive management of essential data unavailable from any alternative source. Similarly, management frequently requires information from its employees promptly. If each request by management must be preceded by a series of negotiations with the employee and his union as to the nature of the interview, the areas of possible jeopardy and the employee's right to union representation, a form of industrial chaos is invited.

Whereas the consequence of according judicial approval to the rule urged by the Board would surely be to retard the flow of information needed by management to carry out its obligation to run its business efficiently, the protections which would thereby be accorded to employees exceed their reasonable requirements. Where contractual grievance and arbitration provisions exist, the substance of any adverse impact on employees resulting from investigatory interviews becomes subject to full review. It is true, of course, that an employee's right with impunity

to restrict management from obtaining information may result in management's inability to sustain the imposition of discipline and thus obviate employees' need to invoke the grievance-arbitration machinery. While this would likely be one effect of the judicial approval of the position urged by the Board below, not even the Board has contended that Section 7 of the Act should be read to insulate employees from the consequences either of their improper conduct or of any conduct unrelated to union or other statutorily protected activity. It is sufficient protection of an employee's legitimate interests to afford him recourse to his contractual remedies, as earnestly and actively pursued by his collective bargaining representatives.

Where no such contractual protections exist, the provisions of the National Labor Relations Act afford relief and redress from any improper management conduct in connection with investigatory interviews.[23] The Board has established a series of rules protecting employees from management interviews which trench on their statutory rights under Section 7. In addition to the familiar general prohibitions against threats and promises of benefit in connection with employees' collective preference and activity,[24] the Board, in a much litigated area of its jurisdiction, has adopted rules specifically governing the isolated questioning and interviewing of employees.[25] The Board has always

23. Such statutory guarantees also exist where employees are covered by the terms of a collective bargaining agreement. In those circumstances, the further protections contained in the Board's proposed rule are doubly unwarranted.

24. See, e.g., *N. L. R. B.* v. *Exchange Parts Co.*, 375 U. S. 405 (1964); *N. L. R. B.* v. *Neuhoff Bros.*, 376 F. 2d 372 (1967); *N. L. R. B.* v. *Power Equipment Co.*, 313 F. 2d 438 (CA 6, 1963); *General Industries Electronics Co.*, 146 NLRB 1139 (1964).

25. *Essex Wire Corp.*, 188 NLRB No. 59 (1971); *Heck's Inc.*, 172 NLRB No. 255 (1968); *Redcor Corp.*, 166 NLRB 1013 (1967); *Blade-Tribune Publishing Co.*, 161 NLRB 1512 (1966); *General Industries Elec. Co.*, 152 NLRB 1029 (1965); *Montgomery Ward & Co., Inc.*, 146 NLRB 76 (1964); *United Aircraft Corp.* v. *N. L. R. B.*, 440 F. 2d 85 (CA 2, 1971); *Bon-R Reproductions, Inc.* v. *N. L. R. B.*, 309 F. 2d 898 (CA 2, 1962).

focused strongly on the protection of employees' rights, as, for example, in rendering unlawful questioning which places an employee in the position of acting as an informer regarding the protected conduct of his fellow employees.[26]

The foregoing discussion leads to two independent conclusions. First, the Board's challenged rule in actuality properly constitutes a non-mandatory subject of bargaining under the rationale of this Court in *Pittsburgh Plate Glass Co., supra.* This Court there held that unless a subject will "settle an aspect of the relationship between the employer and the employees" and unless its impact on their working conditions is significant and not merely "speculative," the employer is under no duty to bargain and may act unilaterally with respect to that subject. In the instant case, for the reasons cited in *Ross Gear and Tool Co.* and its progeny, no employee interest or right warrants or permits a union's involvement until there exists some decision by management which could serve as the basis for a grievance. The Board itself has taken the view that unions have no role to play, pursuant to the bargaining rights granted them in Section 8(a)(5) of the Act, during investigatory interviews. It follows that if no union response is appropriate, or if such a response is premature, then there is not involved an issue which will "settle an aspect of the [parties'] relationship". When, in addition, there exists only a "speculative" need for the union's involvement, as during investigatory interviews where no decision has been made substantially affecting any employee's working conditions, then there is clearly satisfied the requirements for the existence of a non-mandatory bargaining subject. This is particularly true where, as here, there also exist important management interests requiring unilateral action. It is submitted that if the union's presence during purely investigatory interviews is not a mandatory subject of bargaining, then management's refusal to permit such a presence cannot constitute an unfair labor practice. Of course, the parties may choose to negotiate

26. *Abex Corp.*, 162 NLRB 328 (1966).

the subject, as in *Western Electric Co.*, 198 NLRB No. 82 (1972), and thus become bound to their contractual commitments. However, absent such a voluntary act, there exists no right whose denial gives rise to unlawful conduct.

Independently of the question whether a union's presence at purely investigatory interviews constitutes a non-mandatory bargaining subject, the same considerations urged on behalf of that result also support the conclusion that as a matter of sound policy the rule involved herein be rejected by this Court as effecting an unnecessary imbalance between management's legitimate interests and employees' legitimate needs.

Thus, available contractual and statutory remedies are more than adequate to protect employees from the invasion by employers of their legitimate interests during investigatory interviews. Since the information derived from such interviews is essential to employers' ability to manage, and since twenty-five years of experience demonstrates the sufficiency of the Board's former rule in safeguarding the interests of all parties, the Board's current effort to amend that rule should be judicially rejected.

In addition to causing an imbalance in the proper resolution of conflicting interests, the Board's newly adopted rule is inconsistent with Section 203(d) of the Labor Act and subsequent developments in Board law which implemented that Section.

Section 203(d), in pertinent part, provides as follows:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

In the instant cases the parties have, through negotiation, agreed to final and binding arbitration to adjust disputes such as occurred in these cases. It would appear that adherence to the Congressional will codified in Section 203(d) would dictate that the Board leave to the parties' agreed contractual procedures the resolution of their respective rights in this area. The Board's

earlier decision in *Western Electric, supra,* indicated the Board's disposition to do so. The body of law which the Board has evolved as a consequence of its decision in *Collyer Insulated Wire,*[27] in which the Board announced its intention to defer to the parties' mutually chosen contractual remedies, constituted a similar instance in which the Board gave effect to the legislative mandate contained in Section 203(d). Therefore, application by the Board in these cases of its current interpretation of Section 7 ignores the parties' agreement, violates Section 203(d) and conflicts with its own decisions in *Western Electric* and *Collyer.*

While in the cases below, for reasons urged *supra,* the Board may not alter long-standing precedents and now require an employer to permit union representation during investigatory interviews, there exists an independent reason for this Court to repudiate these Board decisions. In *Quality* the Board has engaged in the meritricious practice of retroactively imposing its new rule so that an employer's conduct, lawful before the issuance of that decision pursuant to rules then in effect, was rendered illegal because of that decision. This practice must be discouraged by this Court if the administrative process is to enjoy the respect and esteem necessary for it to function properly.

Accordingly, and apart from all other matters relating to the legitimacy of the rule the Board would impose in these cases, this Court is urged to reject the Board's attempt to convert retroactively into unlawful conduct efforts to observe existing rules which were lawful when pursued.

27. 192 NLRB No. 150, 77 LRRM 1931 (1971).

CONCLUSION.

For the reasons stated herein, together with those raised by the employers, this Court is urged to declare that the rule of law adopted by the Board and challenged here is the product of an impermissible construction of the Act, and to affirm the decisions of the courts below.

Respectfully submitted,

MILTON SMITH,
General Counsel,

RICHARD BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N. W.,
Washington, D. C. 20006,

JERRY KRONENBERG,
Borovsky, Ehrlich & Kronenberg,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for the Amicus Curiae.

Of Counsel:
COLE, ZYLSTRA & RAYWID,
2011 Eye Street, N. W.,
Washington, D. C. 20006.